Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers	)	CC Docket No. 92-26

COMMENTS OF AT&T

Pursuant to the Notice of Proposed Rulemaking herein released March 12, 1992 ("NPRM"), American Telephone and Telegraph Company ("AT&T") submits these comments on the Commission's proposal to amend in certain respects the procedures relating to formal complaint proceedings conducted pursuant to Section 208 of the Communications Act.

AT&T strongly supports the stated purpose of the NPRM "to facilitate timelier resolution of formal complaints" (para. 1). For the most part, the rule changes proposed in the NPRM appear consistent with this objective, and AT&T therefore does not oppose them. In a few specific instances, however, the proposed rule changes regarding discovery could impose unnecessary burden or confusion on the parties, thereby complicating and protracting complaint proceedings contrary to the Commission's objective. These specific discovery rule changes should therefore be modified or not adopted.

More fundamentally, as the NPRM acknowledges (para. 1), the rule changes proposed here plainly do not address all the factors that currently affect or limit the "speed of resolution for all cases." After the parties have completed their factual and legal presentations, only the Commission can make the findings and conclusions needed to resolve the substance of a complaint, yet this NPRM does not reach that vital part of the formal complaint process. Indeed, the NPRM focuses solely on filing intervals for certain pleadings and motions that could, at most, have only a relatively minor effect -- measured in days -- on the duration of complaint proceedings. By contrast, for many complaints today, the time that elapses after the parties have completed the pleadings, discovery and motions to which the amended rules would apply can often be measured in months, or even years.*

In addition to procedural changes such as those proposed in the NPRM, therefore, it is important that the

---

* For example, the parties in Telesphere v. AT&T, File No. E-88-75, submitted their respective motions for judgment, proposed findings of fact and conclusions of law, and final briefs over a period ending on August 10, 1990, pursuant to a schedule agreed to with the assistance of the Commission's staff on the understanding that the record would then be (and indeed has been) closed and the case ripe for decision. There has, however, been no action to date by the Commission resolving this case.

Commission take appropriate steps to address and mitigate other possible sources of delay in the complaint resolution process. As AT&T has described in other proceedings, a "fast track" complaint process including prompt Commission resolution would be of great value in addressing, for example, complaints that foreign-owned carriers are using their foreign affiliations or foreign market power improperly to impair competition in the U.S. market.*

Nonetheless, the limited changes proposed in the NPRM are, in general, constructive attempts to eliminate needless procedural steps and delays in the complaint process. AT&T agrees, for example, that allowing 20 days to answer a complaint (para. 8) and eliminating in most cases the filing of a reply to an answer (para. 10) are likely to streamline the pleading process without unduly restricting parties' opportunities to articulate their positions. AT&T also believes that the briefing time frames and page limits proposed in the NPRM (para. 9) are generally appropriate, but the Commission should make

---

* See, e.g., AT&T Reply Comments, In the Matter of Regulation of International Common Carrier Services, CC Docket No. 91-360, filed March 17, 1992, p. 7.

clear that, in complex cases or where good cause otherwise is shown, the staff can expand time or page limits to accommodate the legitimate needs of the parties.*

With respect to the proposed amendments to the discovery rules (NPRM, paras. 13-19), AT&T suggests that certain modifications be made to preserve parties' legitimate proprietary interests and to prevent the very delays and complexity the proposed rules are intended to avoid.

First, AT&T is concerned that the proposed rules for confidential treatment of proprietary information produced through discovery (NPRM, para. 16) may not, in all instances, afford adequate safeguards. In particular, there may be cases where sensitive pricing or marketing material is produced that should legitimately be withheld altogether from an opposing party's employees (or at least from its marketing employees). In such circumstances, the protective order should provide for more restrictive arrangements than the NPRM appears to contemplate,** such as limiting the inspection of sensitive material to counsel for the opposing party. In this regard, it is not

---

* Likewise, as under the current rules, parties should be permitted to seek extensions of time to answer complaints or respond to motions and discovery requests, if good cause therefor exists.

** The proposed protective order would appear to permit inspection of confidential material by "individuals employed by" the opposing party. NPRM, para. 16 n.13.

necessary that the "form" protective order contemplated by the NPRM automatically contain this additional safeguard. All that is required is for the Commission to make clear that the "form" order can be supplemented in appropriate cases.

Second, AT&T is concerned that the proposal to "preclude objections to discovery based on relevance" (NPRM, para. 15) in fact could produce precisely the burdens and complexity that the NPRM is intended to minimize. Indeed, the proposal cannot be squared with the NPRM's findings (para. 10) that many complaints today "do not contain the level of factual support or legal analysis" required by the current rules, and these "marginally acceptable complaints" apparently evince an intent by complainants improperly to "establish[ ] the basic factual underpinnings of their case through subsequent pleadings or discovery."

The Commission's proposal to preclude relevance-based objections to discovery would only encourage the filing of "marginally acceptable complaints," followed by potentially-massive and aimless "discovery" seeking to explore whether there was, in fact, any basis for the complaint in the first place. A complainant who alleges sufficient facts, supported by at least some evidence, to make out a prima facie case that a violation has occurred should (and does) have the right to

appropriate discovery of factual matters, within the knowledge of the defendant, that are reasonably related to the complaint. In contrast, the complainant should not have the right to use discovery in lieu of having a basis to file the complaint, or to use unfettered and immaterial discovery as a tactic to impose cost and burden on an opponent.*

For these reasons, the right of a party to object to discovery on relevance grounds should not be eliminated or abridged. This is not to say, of course, that a party must prove that discovery will lead to information that is "admissible" in the strict evidentiary sense. It only means that a party must be prepared, if discovery is challenged on relevance grounds, to show some plausible connection between the information sought and resolving the issues raised on the complaint. Only then will the

---

* The NPRM proposal (para. 15) apparently contemplates that a party faced with a "clearly irrelevant" question could simply decline to answer, which "would be deemed an admission of allegations contained in the interrogatory" (id.). The NPRM indicates that this admission would only be relevant to the particular complaint, and thus would not harm the party refusing to answer irrelevant discovery. This "safeguard" is unworkable for two reasons. First, there is no assurance that an "admission" would in fact have no application beyond the specific complaint proceeding. Under the proposed rules, parties would likely have no practical option but to respond to irrelevant discovery to avoid the effects of such an "admission." Second, the rule would encourage the drafting of improper interrogatories that contain allegations rather than questions, seeking to elicit admissions rather than information.

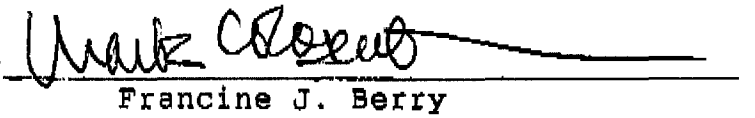
Commission be in a position to determine whether the proponent's need for requested information outweighs the burden, if any, imposed on the respondent.

* * *

For the reasons and to the extent set forth above, AT&T supports the limited, expediting rule changes proposed in the NPRM, subject to the specific suggestions described herein with respect to discovery rules.

Respectfully submitted,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

By 

Francine J. Berry
Mark C. Rosenblum

Room 3244J1
295 North Maple Avenue
Basking Ridge, New Jersey 07920

Its Attorneys

April 21, 1992